IN THE HIGH COURT OF DELHI AT NEW DELHI

I W.P.(C) 24105/2005

STAR INDIA P. LTD. ..... Petitioner through
Mr.Kailash Vasdev, Mr.A.S.Chandihok, Sr. Advocates with Mr.Amar Gupta, Mr.Dheeraj Nair, Mr.Karan Bharihoke, Ms.Ananya Kumar and

versus

THE TELECOM REGULATORY AUTHORITY OF INDIA & ORS. ..... Respondents through
Mr.Rakesh Dwivedi, Sr.Adv. with Mr.Meet Malhotra & Mr. Ravi Chauhan, Advocates for TRAI
Mr. P.P.Malhotra, ASG with Mr.Rajeeve Mehra, Mr.Chetan Chawla, Mr. Gaurav Duggal and Mr.Suresh Kait, Advocates for UOI

W I T H

II W.P.(C) 5332/2006

STAR INDIA P. LTD. .... Petitioner through
Mr.Kailash Vasdev, Mr.A.S.Chandihok, Sr. Advocates with Mr.Amar Gupta, Mr.Dheeraj Nair, Mr.Karan Bharihoke, and Ms.Ananya Kumar

versus

THE TELECOM REGULATORY AUTHORITY OF INDIA & ORS. ..... Respondents through
Mr.Rakesh Dwivedi, Sr.Adv. with Mr.Meet Malhotra & Mr. Ravi Chauhan, Advocates for TRAI
Mr.Sudhakar V. Velankar, President, Grahak Hitvardhini Sarvajanik Sanstha

W I T H

III W.P.(C) 14877-78/2006

STAR INDIA P. LTD. ..... Petitioner through
Mr.Kailash Vasdev, Mr.A.S.Chandihok, Sr.Advocates with Mr.Amar Gupta, Mr.Dheeraj Nair,Mr.Karan Bharioke and Mr.Shankhsengupta,

versus

THE TELECOM REGULATORY AUTHORITY OF INDIA & ORS. ..... Respondents through
Mr.Rakesh Dwivedi, Sr.Adv. with Mr.Meet Malhotra & Mr. Ravi Chauhan, Advocates for TRAI
Mr.P.P.Malhotra, ASG with Mr. Gaurav Duggal and Mr.Rajeev Mehra, Mr.Rakesh Gosain and Mr.Suresh Kait, Advocates for UOI
Dr.A.M.Singhvi, Mr. Aryama Sundaram, Sr.Advocates with Mr.Manjul Bajpai, Ms.Payal and Mr.Aditya Awasthi, Advocates for Indus India Media-Intervenor
Mr.Arun Jaitley, Sr.Advocate with Ms.Indu Malhotra, Mr.Vikas Mehta, Mr.Vibhav Srivastava, Ms.Sunita Ojha and Mr.Kunal Tandon,Advocates for Hathway Cable & Datacom Pvt. Ltd.-Intervenor

W I T H

IV W.P.(C) 16913/2006, W.P.(C) 16914/2006

SET DISCOVERY P.LTD. .... Petitioner through
Mr. Soli J. Sorabjee, Sr. Advocate & Mr. A.S.P.I Chinoy, Sr. Advocate with Mr.Shankhsengupta, Mr.Gopal Jain,Ms.Mridul Sharma, Mr.Anup Bhambani and Ms. Kanika Agnihotri, Advocates

versus

THE TELECOM REGULATORY AUTHORITY
OF INDIA & ORS. ..... Respondents through
Mr.Rakesh Dwivedi, Sr.Adv. with
Mr.Meet Malhotra & Mr. Ravi Chauhan,
Advocates for TRAI
Mr.P.P.Malhotra, ASG with
Mr. Gaurav Duggal and Mr.Rajeev
Mehra, Mr.Rakesh Gosain and
Mr.Suresh Kait, Advocates for UOI
Dr.A.M.Singhvi, Mr. Aryama Sundaram,
Sr.Advocates with Mr.Manjul Bajpai,
Ms.Payal and Mr.Aditya Awasthi,
Advocates for Indus India Media-
Intervenor
Mr.Arun Jaitley, Sr.Advocate with
Ms.Indu Malhotra, Mr.Vikas Mehta,
Mr.Vibhav Srivastava, Ms.Sunita Ojha
and Mr.Kunal Tandon,Advocates for
Hathway Cable & Datacom Pvt. Ltd.-
Intervenor

Judgment Reserved on : May 7, 2007

Judgment Delivered on : July 9, 2007

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE J.P. SINGH

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported In the Digest? Yes

J U D G M E N T

VIKRAMAJIT SEN, J.

1. In Petition No.I (CW 24105/2005) Star India Pvt. Ltd. has prayed for a certiorari quashing the proviso to Section 2 (1) (k) of

the TRAI Act; a certiorari for quashing Tariff Orders dated 15.1.2004, 1.10.2004, 1.12.2004 and 29.11.2005 and the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004. It has further been prayed that the Court should declare that TRAI is not competent to regulate broadcasting services as also another declaration to the effect that these impugned Orders and impugned Interconnect Regulations are violative of Articles 14 and 19 (1) (a) and (g) as also Articles 301 to 307 of the Constitution. In Petition No.II (CW 5332/2006) Star India Private Limited has prayed for the setting aside an order of the Telecom Disputes Settlement and Appellate Tribunal in Appeal No.12(C) of 2005 titled Grahak Hitvardhani Sarvajanik Sanstha -vs- TRAI and (b) issuance of a writ of certiorari quashing the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order 2006 notified on 7.3.2006. In Petition No.III (CW 14877-78/2006) Star India Private Limited has prayed that the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Area) Tariff Order 2006 and further that the Telecommunication (Broadcasting and Cable Services) (Second Amendment) Regulation, 2006 dated 24.8.2006 be struck down being violative of Articles 14, 19, 301 to 307 of the Constitution. In Petition No.IV

(CW 16913-14/2006) filed by Set Discovery Private Limited the following prayers have been made:

> a) Issue writ, order or direction to declare that the TRAI has no jurisdiction or power under Section 11(2) of the TRAI Act to fix tariffs for Broadcasters;
>
> b) Issue writ, order or direction to declare that the TRAI has no jurisdiction or power under Section 11(2) of the TRAI Act to strike down S. 11(2) of the TRAI Act;
>
> c) Issue an appropriate writ, order or direction to quash the Notification dated 31.07.06 (F.No. 9/16/2004-BP&L [Vol. IV] issued by Ministry of Information and Broadcasting;
>
> d) Strike down clauses 3.3 and 9 to 12 of the Telecommunication (Broadcasting and Cable Service) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006) dated 04.09.2006 (No. 6-4/2006-B&CS) as amended by the Telecom Regulatory Authority of India.

2. So far as Petition No.1 is concerned the prayer for quashing Tariff Orders was correctly not pressed before us. So far as Petition No.2 is concerned the Order in Appeal No.12(C) of 2005 was not pressed. Since the Respondents have asserted that the Petitions are not maintainable, we shall immediately deal with that point.

MAINTAINABILITY OF PETITION SEEKING ENFORCEMENT OF FUNDAMENTAL RIGHTS BY A COMPANY

3. Mr. P.P. Malhotra, learned Additional Solicitor General and Mr. Rakesh Dwivedi, learned Senior Counsel for Telecom Regulatory Authority of India(TRAI), have laid a threshold challenge to the very maintainability of the present Petitions seeking the enforcement of the Fundamental Rights enshrined in Article 19 of the Constitution of India. They contend that the very least expected of the Petitioners was to plead facts establishing that they are Indian citizens. Their argument is that the Petitioners have deliberately refrained from doing so since they are in fact foreign companies transacting business in India. Indubitably the burden to clarify their status as citizens of India reposed entirely on the Petitioners and they have miserably failed to plead facts and figures establishing their eligibility. The nature of the shareholding of the Petitioners has been provided to us by the Respondents in terms of the affidavits dated 21.2.2007 filed on behalf of TRAI. So far as Star India Private Limited is concerned it appears that it is completely (98.85899 per cent) held by a foreign company named Buzzer Investments Ltd. registered in Mauritius, which in turn is owned by The News Corporation Ltd. which is registered in Australia. Star India

Private Limited is the sole petitioner in WP(C) Nos.24105/2005 and 5332/2006. Learned ASG has also emphasized the fact that these petitions have been signed and verified by Mr. Himavat Chaudhuri, in the capacity of its Associate General Counsel and Vice-President(Legal). The status in the context of Article 19 has not been elucidated upon in the Petitions. WP(C) No.14877-78/2005 has also been filed by Star India Private Limited through its General Counsel Head of Legal Affairs who has verified the Petition and is also Petitioner No.2. Remarkably, the Petition has not been signed by him. In the Petition it has been vaguely averred that Star India Private Limited is a company incorporated under the Companies Act, 1956, engaged in the business of distributing television channels and that Mr. Ajay K. Sharma is its shareholder. The details of the extended shareholding have not been furnished to the Court. Learned counsel for the Respondents have justifiably also underscored the fact that the petitions do not disclose the manner in which the Fundamental Rights of Mr. Sharma have been infringed.

4. Set Discovery Pvt. Ltd., Petitioner No.1 in WP(C) No.16913-14/2006 is in essence a foreign Company. It has been deposed that - “so far as Set Discovery Pvt. Ltd. is concerned it is a Joint

Venture of Set India Pvt. Ltd. and Discovery Communications India Pvt. Ltd. As regards Set India Pvt. Ltd., 60.57% shares are held by foreign companies and 7.80% shares are held by Foreign Institutional Investors. Thus the foreign shareholding is to the tune of over 68%, 31.63% shares are held by Indian companies and no share are held by individuals. As regards Discovery Communications India Pvt. Ltd., 100% shares are owned by foreign companies namely, Discovery Channel (Mauritius) Pvt. Ltd., Discovery Production Inc. and Discovery Communications Ltd., LLC. The first Company is based in Mauritius & the other two are based in Maryland, USA". It is worth highlighting the fact that there are no individuals, NRIs or foreigners who are shareholders of Set India Pvt. Ltd.. Even though a labyrinth has been created by the Petitioners it is evident that Petitioner No.1 is essentially a foreign company. WP(C) No.2744/2005 has also been filed by Set Discovery Pvt. Ltd. through Mr. Amit Arora, its Regional Manager and Authorised Signatory. It is wholly inexplicable that the Petition has been verified by Mr. Kunal Dasgupta as Director of Set Discovery Pvt. Ltd., whereas in the array of Petitioners he is described as the CEO of Set India Pvt. Ltd..

5. In this regard the following observations found in

Secretary, Ministry of Information & Broadcasting, Govt. of India, -vs- Cricket Association of Bengal*, (1995) 2 SCC 161* (abbreviated hereunder as **'CAB'***)* have been relied upon on behalf of the Petitioners.

> 73. It is also contended that the exercise of right claimed in the present case is by BCCI/CAB and its office bearers who are citizens of India. Merely because foreign equipment and technical and personnel are used as collaborators to exercise the said right more effectively, it does not dilute the content of Article 19(1)(a) nor does it become an exercise of right by non-citizens. In this connection, it is emphasized that the Doordarshan is also using Worldtel, a foreign agency. Most of the newspapers in India are printed on machines imported from abroad. A newspaper may also have a foreigner as its manager. However, that does not take away the right of the newspaper under Article 19 (1) (a). They are only instances of technical collaboration. Apart from it, every citizen has a right to information as the same cannot be taken away on grounds urged by the MIB.

6. On the other hand, the learned counsel for the Respondents have taken us through a catena of cases containing reflections on the legal position of whether a company can file a petition seeking enforcement of Fundamental Rights. In *The State*

Trading Corporation of India -vs- The Commercial Tax Officer, Visakhapatnam, AIR 1963 SC 1811 : 1964 (4) SCR 99 (***STC case*** in short), the nine-Judges Bench of the Supreme Court clarified that the Constitution deliberately and advisedly makes a clear distinction between Fundamental Rights available to 'any person' and those guaranteed to 'all citizens'. Article 19 inter alia guarantees citizens of India (a) the freedom of speech and expression and (g) the right to carry on any occupation, trade or business. Their Lordships thereafter observed that the provisions of the Constitution of India in Part II relating to 'citizenship' are clearly inapplicable to juristic persons; and that neither the provisions of Constitution Part II nor of the Citizenship Act confer the right of citizenship on recognized citizens, any person other than a natural person; that they do not contemplate a corporation as a citizen. Their Lordships poignantly opined that Part-III of the Constitution, which proclaims Fundamental Rights, was very accurately drafted, delimiting rights like freedom of speech and expression, right to practice any profession etc. as belonging to citizens only and the more general rights like the right to equality before the law, as belonging to all persons; that corporations may have nationality in accordance with the country of their incorporation but that does not necessarily confer

citizenship on them.

7. This is also the view expressed in *Dharam Dutt -vs- Union of India*, (2004) 1 SCC 712. We are of the opinion that where companies approach the Court complaining of violation of Fundamental Rights the pleadings must, in the nature of basics, clearly spell out the manner in which individuals or natural persons are affected. In all the writ petitions before us this aspect has been glossed over, and in our considered opinion obviously for the reason that when the corporate veil is lifted the alleged infraction of these rights pertain to a negligible number of citizens. The gravamen of the assault is predicated on the infringement of the right to freedom of speech and expression. The Petitioner must disclose the manner in which Fundamental Rights of a citizen have been violated. It may be possible, in an exceptional case, that although the Petitioner is an incorporated entity, further compounded by the fact that it is not an Indian citizen, the views of reputed Indian journalists have been silenced. In such cases, the siege may eventually turn out to be successful. This does not detract from the necessity to carefully plead necessary details and circumstances showing that the plaintive cry is of an Indian citizen and not of a

foreigner.

8. *Indo-China Steam Navigation Co. Ltd. -vs- Jasjit Singh, Additional Collector of Customs*, 1964 (6) SCR 594 was decided by a Constitution Bench comprising five members of the larger ***STC Case***. The facts were that a vessel had contravened the provisions of Section 52-A of the Sea Customs Act when it entered the Calcutta Port. Learned counsel for the Petitioner had sought to argue that if *mens rea* was not an essential element of Section 52-A that provision would be ultra vires Articles 14, 19 and 31(1) and as such unconstitutional and invalid. The Constitution Bench observed that the Appellant was "not only a company, but also a foreign company, and as such is not entitled to claim the benefits of Article 19. It is only citizens of India who have been guaranteed right to freedom enshrined in the said Article. ..... The plain truth is that certain rights guaranteed to citizens of India under Article 19 are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would, therefore, not be available to foreigners". This very question thereafter arose before another Constitution Bench in *Tata Engineering and Locomotive Co. Ltd.* (***Telco***) -vs- *State of Bihar*,

1964(6) SCR 885 and yet again was rejected. Following the ***STC case*** the Constitution Bench opined that the "Petitioners cannot be heard to say that their shareholders should be allowed to file the present petitions on the ground that, in substance, corporations and companies are nothing more than association of share-holders and members thereof. In our opinion, therefore, the argument that in the present petition we would be justified in lifting the veil cannot be sustained". Thereafter the decision of the Bench of eleven Judges in *Rustom Cavasjee* ***Cooper*** *-vs-Union of India*, 1970 (1) SCC 248 reiterated the same legal position. It opined that a company registered under the Companies Act is a legal person, separate and distinct from its individual members. All its shareholders may not be entitled to move a petition for infringement of the rights of the company unless by the impugned action his right had also been infringed. On facts it was found that the Petitioner had challenged the alleged infringement of his own rights and hence he had the legal capacity to file and pursue the writ petition. The challenge concerned the commercial interests of the Petitioner as a shareholder and not for safeguarding his freedom of speech and expression.

9. The Constitution Bench thereafter encountered this very

legal nodus in ***Benett Coleman*** *& Co. -vs- Union of India*, (1972) 2 SCC 788. Their Lordships noted that neither in *Express Newspapers (P) Ltd. -vs- Union of India*, 1959 SCR 12 : AIR 1958 SC 578 nor in ***Sakal*** *Papers (P) Ltd. -vs- Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305 had any plea been raised about the maintainability of the writ petition. It bears highlighting that so far as ***Sakal*** was concerned it had only two shareholders who had joined the litigations as petitioners. Furthermore, the case projected by ***Sakal*** was that owing to its comparatively wide circulation, it was instrumental in playing a leading part in the dissemination of news and views and in moulding public opinion in matters of public interest. ***Sakal*** had also asseverated that it was not aligned with any political party and that the public referred to and replied upon the opinions articulated in it on controversial issues. We wish to emphasize that this role, which is quite distinct to simple entertainment, has always been considered so vital to nation building and social awareness that it has in almost all legal systems been accorded preeminence. Hence it has been viewed as a freedom and not a mere right. To put entertainment on parity with freedom of speech and expression seems to us to trivialize the function of the press and therefore to be logically and legally incongruent. After discussing

the cases already mentioned by us above, their Lordships spoke as follows:

> 22. In the Bank Nationalization case (supra) this Court held the statute to be void for infringing the rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the Bank Nationalization case (supra) the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the Bank Nationalization case (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The Bank Nationalization case (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1)(a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised through their newspaper through which they speak. The press reaches the public

> through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The locus standi of the shareholder petitioners is beyond challenge after the ruling of the Supreme Court in the Bank Nationalization case (supra). The presence of the company is on the same ruling not a bar to the grant of relief.

10. A couple of years thereafter, another Constitution Bench in the case reported as *The State of Gujarat -vs- The Ambica Mills Ltd., Ahmedabad*, (1974) 4 SCC 656 recorded that in view of ***Telco***, ***Cooper*** and ***Benett Coleman*** it had been settled "that a corporation is not a citizen for the purposes of Article 19 and has, therefore, no Fundamental Right under that Article". This conundrum has also been considered by H.M. Seervai in the treatise "Constitutional Law of India" IVth Edn. where the learned author and distinguished advocate had expressed the view that this state of the law is unsatisfactory. However, after culling out and expressing the view in paragraph 10.26 on page 708, the opinion has been expressed that a corporation seeking to enforce Fundamental Rights must fulfill two conditions - (a) the

majority of its shareholders must be Indian citizens and (b) its management and control must in the hands of Indian citizens. This discussion discloses the undisputed view that foreigners and foreign corporations cannot enforce the Fundamental Rights enshrined in Part III of the Constitution.

11. We have already analyzed the respective shareholding of the Petitioners, brushing aside the skein of holding companies, and the minuscule and infinitesimal number of shares in Indian hands. Mr. Shenoy has forcefully posited that the Indian Constitution, as explained in ***Benett Coleman,*** does not consider it essential that a `class action' should be initiated in order to successfully withstand an assault on the Fundamental Right of a citizen; nay, even a single citizen has the inviolable right to enforce compliance and respect to his Fundamental Rights. In our opinion whilst there is no scope for applying a quantitative test a qualitative test is essential in such matters. As has specifically been observed in ***Benett Coleman*** the rights of a writer or Editor of freedom of speech and expression must be protected. But these rights cannot be confusedly and incorrectly enforced in favour of persons not falling in this category. A single shareholder may have sufficient locus standi to fight the

cause of a company whose commercial interests are common to his, as had happened in the Bank Nationalization cases. The employment of the word `citizen' should not be washed away or watered down. ***Bennet Coleman*** was not a foreign company. The right of speech and expression, being zenithal in nature, is a freedom incomparable to any other Fundamental Right. Whilst its amplitude ought not to be circumscribed, curtailed or restricted its immense impact on the population requires its availability only to citizens. EcoSOC in terms acknowledges and advocates the wisdom in preserving all existing cultures and customs. If freedom of speech and expression is made available to foreign entities it would directly result in imposing their foreign cultural values on our society. In fact they are already doing this unabashedly without any check or restraint through their so-called family-life and other so-called entertainment serials. They are displaying naked vulgarity starting with innocent kids to above 60 years old women. They are teaching bad manners, adultery, rapes, innovative methods of murders, illegitimacy and all sorts of indecencies and crimes to the Indian families which were hitherto foreign to Indian culture. They have hijacked and monopolized the media from 24 X 7 hours. They are unashamedly indulging in cultural sabotage from within the

country and their role is like the role of Anti National people and Public Enemies and is akin to the role of terrorists but under the cover of media and in the name of freedom of speech and expression. We cannot comprehend a more belligerent use of these freedoms. The Respondents and their associates have apparently shut their eyes, may be for ulterior motives. The economic strength of Western countries has an irresistible effect on changing the mindset of developing nations and these societies tend to ape, copy, imitate and replicate the economically advanced nations. Courts should be loath to permit such an assault and invasion by indiscriminately extending freedom of speech and expression under Article 19(1)(a) to persons who are not Indian citizens. It would be relevant to recall that in ***CAB*** the Supreme Court had observed that -- "what distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to <u>all including children at home</u>." In that very case the Apex Court had noted the absence of any suggestion before it that acknowledgment of a foreign agency by the BCCI/CAB is violative of the provisions of Article 19(2) of the Constitution.

(emphasis added)

12. On behalf of Star India Pvt. Ltd. in the Written Argument a submission has been advanced that its petition is not restricted to or predicated upon Article 19 (1) (a) "but primarily seeks to challenge the amendment made to Section 2 (1) (k) of the TRAI Act which gives untrammeled powers to the Central Government being totally contrary to the intention of the framework of the TRAI Act. As explained above the TRAI Act is not designed to regulate or deal with broadcasting services as broadcasting industry is significantly different from the telecom industry. The amendment is also challenged on the ground that the proviso is ultra vires the TRAI Act and amounts to excessive delegation. Such a challenge is capable of being maintained on its own by a Company without any shareholder/s being arrayed as Petitioner (s). It is submitted that remedy available under Article 226 of the Constitution are wide and not restricted to violations of fundamental rights". This is obviously an argument in desperation because the bulwark and fulcrum of the Petitioners' case is what they receive as a flouting of the freedoms of speech and expression guaranteed in Article 19 of the Constitution. In fact, the gravamen of the argument on behalf of the Petitioners

relates to 19 (1) (a) and not merely 19 (1) (g) of the Constitution. If this argument is to be accepted, we must not permit the Petitioners' to proceed any further once the discussion of the statutory provisions is completed. We must not permit the Petitioners' to approbate and reprobate.

13. The inescapable conclusion is that the present petitions are not maintainable. We had considered the option to dismiss these petitions on this short ground. However, we consider it unconscionable to traverse this path since we have heard extensive arguments on the myriad aspects of law that have been revealed in these cases. We, therefore, now proceed to consider those questions, even though we are unequivocally of the opinion that the petitions are not maintainable.

INTERPRETATION OF DEFINITION OF TELECOMMUNICATION SERVICE

14. The primary attack of the Petitioners is that broadcasting activity has decidedly been kept beyond the purview of the Telecom Regulatory Authority of India, 1997 (TRAI Act). The principal argument in this context is that the present proviso to Section 2 (k) is ultra vires the main provision and must therefore be struck down. In order to holistically interpret the phrase “telecommunication service” we have juxtaposed the definition in

Section 2(1)(k) along with 3(1AA) of the Indian Telegraph Act, 1885 (Telegraph Act):

2(1)(k)	3(1AA)
'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any **transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire,** radio, **visual or other electronic-magnetic** mean <u>but shall not include broadcasting services</u>: Provided that the Central Government may notify other service to be telecommunication service including broadcasting services	'telegraph' means any appliance, instrument, material or apparatus used or capable of use for **transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire**, **visual or other electro-magnetic** emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means. Explanation.--'Radio waves' or 'Hertzian waves' means electro-magnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide

(emphasis added)

The contention on behalf of the Respondents is that even a cursory reading of these definitions will reveal that 'telegraph' and 'telecommunication services' have similar definitions and thus fall within the sweep of the Telegraph Act as well as the TRAI Act. They further contend that `broadcasting' also falls

within the same definition. Mr. Shenoy, however, seeks to clarify that the definition in the Telegraph Act refers to machinery whereas Broadcasting concerns the content carried on these machines. Without going into minute detail, it seems to us that Broadcasting is covered under both the statutory definitions. This is of importance for the simple reason that, but for the exclusionary words underlined by us, broadcasting activities would automatically be regulated and governed by the TRAI Act also. In the analysis made hereinafter, this could not have been the intention of Parliament.

15. We need to briefly traverse through the annals of this legislation along with some others covering concerns cognate to it. It has now come to be accepted that this exercise is permissible, nay recommended, wherever and whenever the Court is confronted with a conundrum in the troublesome task of statutory interpretation. In *Kesavananda Bharati -vs- State of Kerala,* (1973) 4 SCC 225: AIR 1973 SC 1461, the Supreme Court did not hesitate to refer to the Constituent Assembly Debates to glean the intention of the framers of the Constitution in the context of the Articles attracted for their Lordships' cogitation. In *Election Commission, In Re: Special Reference No. 1 of 2002,*

(2002) 8 SCC 237 the Constitution Bench again acknowledged that one of the "known methods to discern the intention behind enacting a provision of the Constitution and also to interpret the same is to look into the historical legislative documents. Constituent Assembly Debates or any enactment proceeding the enactment of the constitutional provision." These decisions have, very recently, been favourably referred to by the Constitution Bench in *Kuldeep Nayyar -vs- Union of India,* (2006) 7 SCC 1.

16. The Statement of Objects and Reasons (SOR for short) of the TRAI Act refers to the National Telecom Policy, 1994 which apart from attempting to attain universalisation of services, strove to provide world-class telecom services at a reasonable price to the customers. The effort was to devise a method of protecting and promoting consumer interests by ensuring fair competition within service providers. The TRAI Act came into force on 25.1.1997. Its Preamble specifically mentions the protection of the interests of service providers and consumers of the telecom sector, and the promotion of its orderly growth.

17. The proviso to Section 2(1)(k) [reproduced above] was inserted vide Telecom Regulatory Appellate Authority of India

(Amendment) Act, 2000 which came into operation on 24.1.2000. Its SOR speaks of the pressing need to strengthen and increase the investor's confidence in the telecom sector and the endeavour to create a level playing field between public and private operators. This Amendment Act established TDSAT for the purpose of adjudicating disputes between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers, and also to hear and dispose of any appeals from the direction, decision or order of TRAI. The salient features of TRAI, inter alia, is the clear distinction demarcated by it between the recommendatory/advisory functions of TRAI and its regulatory functions; enlargement of the functions of TRAI to include terms of interconnectivity between service providers, laying down of standards of service, making recommendations of efficient management of available spectrum. Of special significance to the problem that has been presented before us is that the SOR specifically states that the tariff setting function of the Authority has been brought under the purview of sub-section (3) of Section 11. However, it is indeed noteworthy that the SOR fails to make any mention of the circumstances necessitating the introduction of the Proviso to Section 2(1)(k), which facet of the amendment

is at the fulcrum of the dispute before us. For that matter, even the Telecom Regulatory Authority of India (Amendment) Ordinance, 2000, promulgated by the President on January 24, 2000 is also remarkably reticent on this point.

18. Section 3(1AA) of the Telegraph Act being the definition of `telegraph' had already been introduced into that statute with effect from 2.5.1961. It is in this context that it has been emphasized that the definitions in the TRAI Act has palpably been substantially lifted from the Telegraph Act. Therefore, even if the TRAI Act is ignored, telecom services as well as broadcasting services would be regulated by the Telegraph Act. The umbilical connection is also apparent from manifold and repeated references in TRAI Act to the Telegraph Act. The definition of licensee and licensor in the former statute refers back to Section 4 of the latter Act. The Broadcasting Bill which was intended to be contemporaneous legislation to the TRAI Act, was introduced in Parliament in 1997 and was referred to the Joint Parliamentary Committee for detailed consideration. The Bill, however, lapsed consequent upon the premature and precipitate dissolution of Parliament in December 1997. The intention of Parliament was already manifestly clear, namely, that although

broadcasting is inherently covered under the TRAI Act and the Telegraph Act, its galloping growth has warranted that it should be governed by a separate statutory structure. It was for this reason that although broadcasting services would fall within the umbra of the definition of telecommunication services as available in Section 2(k) of the TRAI Act, it was from the very inception intentionally excluded therefrom, in the sanguine expectancy that the Broadcasting Bill would very soon receive statutory standing alongside the TRAI Act. In the event, however, the planning proved presumptuous. The Proviso is the penumbra which will persist only till the passing of the Broadcasting Bill or the Convergence Bill, as the case may be. It appears to us that this is the intention of Parliament.

19. The galloping and geometric growth in the telecom sector meanwhile continued to engross the Executive as well as Parliament which devised the new Telecom Policy in 1999. In January, 2000 Parliament constituted the Sub-Group on Convergence under the Convenorship of Mr. Fali Nariman. The following extract from its Report dated 11.8.2000 commends its reproduction - “The Subgroup (1) discussed the issue of a common authority for broadcasting and telecom. While

appreciating the need of a single regulatory authority to regulate both telecom and broadcasting rather than create separate authorities for regulating broadcasting, IT, etc. the Subgroup felt that the nature of disputes in the broadcasting industry were quite different and the number of players too large. It would, therefore, not be prudent to burden the TRAI with this additional responsibility. However, keeping in view the fact that integration of the two sectors was taking place very rapidly in the wake of technological convergence, the Subgroup felt that there was a need to have an enabling provision in the TRAI Act by amending the definition of Telecommunication Service under Section 2(1)(k) so as to include broadcasting services."

20. In December, 2003 a Division Bench of this Court in CWP 8993-4/2003 titled Consumer Coordination Council -vs- Union of India, permitted the Conditional Access System (commonly called CAS) to be introduced in Delhi. Poignantly for the present purposes, the Government was directed to "look into the question of framing a policy with regard to those channels which generate a lot of money by advertisements, as to why those channels where money is received by advertisements, should not be notified as FTA channels. Respondents to also consider in regard to the time

allotted in a slot of 30 minutes to advertise whether a limit needs to be put in respect of time for advertisements." These Orders are obviously the precursors of those passed by TRAI subsequently. Notification S.O. 39(E) dated 14.1.2003 made it obligatory for every Cable Operator in Chennai, Mumbai, Kolkata and Delhi to transmit programmes of every pay channel through CAS. It is common knowledge that the date of implementation of the Notification was extended several times, largely owing to pressures that were brought to bear on the Government by vested interests and lobbies.

21. With this background in mind we shall now examine the manner in which provisos are to be interpreted, as analyzed and explained in a plethora of precedents. In this regard the primary principle of interpretation is that the Court's first endeavour must be to harmoniously construe all provisions allowing each one to play its logical role. Conflict between them should be avoided. Various methods and devices are employed to achieve this objective including a course of construction in which a general provision gives way to a specific one. Differently stated, Parliament would ordinarily not give with one hand anything which it takes away with the other. In the present case it should

be assumed that Parliament intended that a Proviso should play its part rather than be jurally amputated as a statutory appendix. Case law is so legion that reference to them will needlessly make our judgment prolix. We shall restrict our reference, therefore, to the case cited before us, namely, *K.M. Nanavati -vs- The State of Bombay,* AIR 1961 SC 112 where the issue concerned the interplay between Articles 142 and 161 of the Constitution. The Supreme Court was empowered under Article 142 "to make such order as is necessary for doing complete justice in any cause or matter pending before it, whereas Article 161 reposed power in the Governor of the State to suspend, remit or commute sentences." The Supreme Court observed that judicial power as well as executive power would, therefore, be exercisable in the same field, and that what is more confounding is that neither of the provisions are subject to or limited by the other. In these circumstances it was observed that "if there is any field which is common to both, the principle of harmonious construction will have to be adopted in order to avoid conflict between the two powers. It will be seen that the ambit of Article 161 is very much wider and it is only in a very narrow field that the power contained in Article 161 is also contained in Article 142, namely, the power of suspension of sentence during the period when the

matter is sub judice in this Court. Therefore on the principle of harmonious construction and to avoid a conflict between the two powers it must be held that Article 161 does not deal with the suspension of sentence during the time that Article 142 is in operation and the matter is sub judice in this Court. .... Therefore, if there is any field where the two powers can be exercised simultaneously the principle of harmonious construction has to be resorted to in order that there may not be any conflict between them".

22. Of equal importance is the principle that requires that a later or subsequent provision, textually or chronologically, should prevail upon an earlier one. In *The King -vs- Dominion Engineering Co. Ltd.*, AIR 1947 Privy Council 94 it has been opined that where a section or enactment contains two provisos and the second proviso is repugnant to the first, the second proviso must prevail for it stands last in the enactment and speaks the last intention of the makers. In similar vein it has been observed in *Govt. of T.N. -vs- Park View Enterprises*, (2001) 1 SCC 742 that the later section will carry effectiveness in the event of a contra intention expressed in an earlier provision of the statute. This is really in consonance with the maxim *leges*

posteriores priores contrarias abrogant.

23. It will also be useful to refer to *Municipal Corporation of Delhi -vs- Shiv Shanker,* 1971 (1) SCC 442 where it has been observed that Parliament "which may generally be presumed to know the existing law, is not expected to intend to create confusion by its omission to express its intent to repeal in clear terms. The Courts, therefore, as a rule, lean against implying a repeal unless the two provisions are so plainly repugnant to each other that they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time. The repeal must, if not express, flow from necessary implication as the only intendment. ... Statutes in pari materia although in apparent conflict should also so far as reasonably possible, be construed to be in harmony with each other and it is only when there is an irreconcilable conflict between the new provision and the prior statute relating to the same subject-matter, that the former being the later expression of the Legislature, may be held to prevail, the prior law yielding to the extent of the conflict." Again, in *Jasbir Singh -vs- Vipin Kumar Jaggi*, (2001) 8 SCC 289 it has been held that later enactments prevail over earlier ones.

24. The next aspect is whether a proviso partakes of a character akin to the main provision itself or can it stand independently? It would be appropriate to commence the discussion with the decision of the Constitution Bench in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory -vs- Subbash Chandra Yograj Sinha,* (1962) 2 SCR 159. After referring to a number of English decisions their Lordships observed that generally "a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But, provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be constructed as controlled by the section." These observations were applied in *S.* Sundaram ***Pillai*** *-vs- V.R. Pattabiraman*, (1985) 1 SCC 591 as well as *Motiram Ghelabhai -vs- Jagan Nagar*, (1985) 2 SCC 279. In ***Pillai*** it was observed that "the well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In

other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment."

25. Learned counsel for the Petitioners have laid great store on the following passages from ***J.K. Industries*** *Ltd. -vs- Chief Inspector of Factories and Boilers,* (1996) 6 SCC 665:

> 33. A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully scrutinise and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the section be construed first without reference to the proviso and if the same is found to be ambiguous only then recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.
>
> 34. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but

for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something by way of *addition* to the main provision which is *foreign* to the main provision itself.

35. Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be ultra vires of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity.

36. While dealing with proper function of a proviso, this Court in CIT v. Indo Mercantile Bank Ltd. opined:

> "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or

> dealing with a subject which is foreign to the main enactment."

The argument that is advanced on the strength of this authority is that a Proviso is almost always disjunctive in nature and should not subsume the main provision to which it is appended; that the subordinate must perforce give way to the primary. If this principle is to be strictly applied we would have no option but to strike down the Proviso as ultra vires to the main section. Certainly we should not render the words "but shall not include broadcasting services" in the main provision otiose; of that we have no doubt whatsoever.

26. Per contra to ***J.K. Industries***, after analysing several precedents the Supreme Court has, in *Board of Revenue, Madras -vs- R.S. Jhaver*, AIR 1968 SC 59, opined that in exceptional circumstances a proviso may not be a proviso in the accepted sense but may be a substantive provision itself. In *UPSRTC -vs- Mohd. Ismail* (1991) 3 SCC 239, their Lordships have similarly opined that "sometimes the insertion of a proviso by the draftsman is not strictly adhered to its legitimate use and it may be in substance a substantive provision adding to and not merely excepting something out of or qualifying what goes before it."

Thereafter, in *Laxminarayan R Bhattad -vs- State of Maharashtra*, (2003) 5 SCC 413, their Lordships have reiterated, substantially on the lines of paragraph 43 of ***Pillai,*** the principles of statutory interpretation in this articulation:-

> 55. A proviso, as is well known, may serve different purposes:
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> (i) qualifying or excepting certain provisions from the main enactment;
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> (ii) it may entirely change the very concept or the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
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> (iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
>
> (iv) it may be used merely to act as an optional addendum to the enactment with the sole object of explaining the real intendment of the statutory provision.

27. Mr. Shenoy, the learned counsel for the Petitioner has contended that a proviso may exist as an independent provision provided it does not make any reference to the main body of the Section to which it stands attached. He has further argued that such independent provisions may derogate from the other

provisions and if they are of subsequent vintage, then even on the application of the maxim '*leges posteriores priores contrarias abrogant*' they would remain impervious or impregnable to attacks of being struck down being ultra vires. His submission is that since the substantive part of Section 2 (1) (k) of TRAI Act clearly contemplates broadcasting services the proviso cannot be construed as an independent legislation and hence must be struck down. In the Rejoinder he has relied on the decision of the Privy Council in *James Winter -vs- Attorney General of Victoria*, (1874-75) L.R.6 P.C. 378 and to the extracted paragraph from *Dwarka Prasad -vs- Dwarka Das Saraf*, (1976) 1 SCC 128*:*

> "We may mention in fairness to Counsel that the following, among other decisions, were cited at the Bar bearing on the uses of provisos in statutes: *C.I.T. v. Indo-Mercantile Bank Ltd.*, 1959 Supp. 2 SCR 256; *M/s. Ram Narain Sons Ltd. v. Asstt. C.S.T.*, (1955) 2 SCR 483; *Thompson v. Dibdin*, 1912 AC 533; *Rex v. Dibdin*, 1910 Pro Div 57 and *Tahsildar Singh v. State of U.P.*, 1959 Supp 2 SCR 875. The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are

tacked as a proviso. They cannot be read as divorced from their context' (1912 AC 544). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. *To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.*

The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail.

28. It is also a firmly entrenched principle of interpretation of statutes that the Court is obliged to correct obvious drafting errors and adopt the constructive role of 'finding the intention of Parliament... not only from the language of the statute, but also

from a consideration of the social conditions which gave rise to it' as enunciated in *State of Bihar -vs- Bihar Distillery Ltd*. (1997) 2 SCC 453. The Court should also endeavour to harmoniously construe a statute so that provisions which appear to be irreconcilable can be given effect to, rather than strike down one or the other. It must also not be forgotten that jural presumption is in favour of the constitutionality of a statute.

29. Reverting back to the statutory provisions before us, assuming that the Proviso is repugnant to the main provision it is the Proviso, being contextually and chronologically posterior, which has to prevail. However, it is our understanding that there is no repugnancy in the two provisions and that the intention of Parliament is palpably plain that both must co-exist possibly until such time as the Broadcasting Act is brought onto the statute book, or a Convergence Bill is enacted dealing with all three aspects of this activity viz. telegraph, telecommunication and broadcasting. Keeping this enunciation of law in perspective, we are of the opinion that far from being clumsy or awkward drafting, as contended by learned counsel for the Petitioners, the definition in Section 2(1)(k) of the TRAI Act has perforce to be in its current conformation. The words “but shall not include

broadcasting services" must essentially stand alongside the Proviso, which empowers the Central Government to notify other services along with Broadcasting to be treated as telecommunication services and thereby fall within the parameters of the TRAI Act. Learned Senior Counsel for the Petitioners had drawn our attention to Entry 31 of List I Of the 7th Schedule of the Constitution of India which mentions - "Posts and Telegraph : Telephones, Wireless, Broadcasting and other forms of communications". Evidently, far from being a strangebed-fellow, broadcasting falls in the same category as telecommunications. This is also clear from the fact that broadcasting has specifically been mentioned in 2(k) as not being included in the definition of telecommunication services, which would have been unworthy of mention unless it was seen as inherently similar. We do not think it relevant that while costing of telecommunication services can be easily computed broadcasting present problems.

30. The abiding and enduring intention of the legislature is that Broadcasting should be monitored by a distinct statute and till such time as that does not happen the TRAI Act would regulate this activity, if the Government so desires. Broadcasting as also

any other services could, by taking resort to a Notification, fall within the purview of the statute; and with equal ease be taken out of it. It is indeed significant to note that although the Proviso was added via an amendment on January 24, 2000 the Notification was promulgated a considerable time thereafter, as late as on 9-1-2004. So far as we are concerned, this indicates that the Government has acted in a responsible and thoughtful manner. It should not be overlooked that there is much to be said in favour of bringing about changes into a statute through the device of Notifications especially where advances in technology and science lead to rapid obsolescence and equally exponential inventions and innovations. In *Laxmi Video Threatres -vs- State of Haryana*, (1993) 3 SCC 715 and *State -vs- S.J. Choudhary*, (1996) 2 SCC 428 their Lordships have recommended that statutes should be so construed by Courts as to ensure that changes in science and technology are given full effect. It seems to us that by the introduction of the Proviso implementation of this salutary principle has been ensured. On the strength of these judgments, however, had there been any repugnancy it would have been the Proviso which would have been given effect to by us.

31. Before proceeding to consider other arguments articulated

by learned Senior counsel for the Petitioners we should mention the decision of the Division Bench of the High Court of Judicature, Andhra Pradesh in Messrs J.K. Communications -vs- The TRAI and others, (W.P. No.12781 of 2006), sought to be relied upon by the learned Senior Counsel for TRAI. It is clear to us that the vires of Section 2 (1) (k) of the TRAI Act had not been assailed in that case. However, the contention that since "Section 2(k) of TRAI Act excluded the term 'broadcaster' from the definition of 'telecommunication service', the inclusion of "broadcaster" in the definition of 'service provider' under Regulation 2(n)" of The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 is ultra vires the powers of TRAI was summarily rejected.

32. We shall now shift focus to Section 11 of the TRAI Act which has been substantially altered by the Amending Act of 2000 inasmuch as its first subsection has been completely substituted by the extant one. However, the provision with which we are presently concerned, viz. sub-section (2), has not been touched. It empowers TRAI to determine and prescribe "the rates at which the telecommunication services within and outside India shall be provided." Its Proviso bestows discretion on TRAI "to notify

different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor. The fact that different treatment can be meted out to similarly placed persons is indeed far-reaching. The contention of the Petitioners is that the power of TRAI to fix rates infringes Article 19 of the Constitution beyond the contours of its infrangibility. Their argument is that rate or price fixation is not one of the exceptions contemplated by Article 19(2) and hence must be struck down being ultra vires to the Constitution. Reasonable restrictions upon the freedom of speech and expressions can be imposed by the State (i) in the interests of the sovereignty and integrity of India; (ii) the security of the State; (iii) friendly relations with Foreign States; (iv) public order, decency or morality; (v) in relation to contempt of Court; (vi) defamation and (vii)incitement to an offence. With regard to the powers of price fixation, emphasis has been laid by learned Senior Counsel for the Petitioners on the decisions of the Supreme Court reported as (1) Romesh Thapar -vs- The State of Madras, [1950] 1 SCR 594, (2) ***Sakal,*** (3) ***Benett Coleman,*** (4) ***Indian Express Newspapers*** *(Bombay) Private Ltd.* *-vs- Union of India,* (1985) 1 SCC 641 *(5) and* ***CAB*** wherein the following enunciation of the

law is to be found*:*

> 71. Merely because an organisation may earn profit from an activity whose character is predominantly covered under Article 19(1)(a), it would not convert the activity into one involving Article 19(1)(g). The test of predominant character of the activity has to be applied. It has also to be ascertained as to who is the person who is utilizing the activity. If a businessman were to put in an advertisement for simpliciter commercial activity, it may render the activity, the one covered by Article 19 (1)(g). But even newspapers or a film telecast or sports event telecast will be protected by Article 19 (1)(a) and will not become an activity under Article 19(1)(g) merely because it earns money from advertisements in the process. Similarly, if the cricket match is telecast and profit is earned by the licensing of telecasting right and receipts from advertisements, it will be an essential element for utilization and fulfilment of its object. The said object cannot be achieved without such revenue.
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> ....
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> 74. It will be apparent from the contentions advanced on behalf of MIB that their main thrust is that the right claimed by the BCCI/CAB is not the right of freedom of speech under Article 19(1)(a), but a commercial right or the right to trade under Article 19(1)(g). The contention is based mainly on

two grounds, viz., there is no free-speech element in the telecast of sports and secondly, the primary object of the BCCI/CAB in seeking to telecast the cricket matches is not to educate and entertain the viewer but to make money.

75. It can hardly be denied that sport is an expression of self. In an athletic or individual event, the individual expresses himself through his individual feat. In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19 (1) (a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right. The

degree of the element will depend upon the character of the telecaster who claims the right. An organizer such as the BCCI or CAB in the present case which are indisputably devoted to the promotion of the game of cricket, cannot be placed in the same scale as the business organizations whose only intention is to make as large a profit as can be made by telecasting the game. Whereas it can be said that there is hardly any free-speech element in the right to telecast when it is asserted by the latter, it will be a warped and cussed view to take when the former claim the same right and contend that in claiming the right to telecast the cricket matches organized by them, they are asserting the right to make business out of it. The sporting organizations such as BCCI/CAB which are interested in promoting the sport or sports are under an obligation to organize the sports events and can legitimately be accused of failing in their duty to do so. The promotion of sports also includes its popularization through all legitimate means. For this purpose, they are duty bound to select the best means and methods to reach the maximum number of listeners and viewers. Since at present, radio and TV are the most efficacious methods, thanks to the technological development, the sports organizations like BCCI/CAB will be neglecting their duty in not exploring the said media and in not employing the best means available to them to popularize the game. That while pursuing

their objective of popularizing the sports by selecting the best available means of doing so, they incidentally earn some revenue, will not convert either them into commercial organizations or the right claimed by them to explore the said means, into a commercial right or interest. It must further be remembered that sporting organizations such as BCCI/CAB in the present case, have not been established only to organize the sports events or to broadcast or telecast them. The organization of sporting events is only a part of their various objects, as pointed out earlier and even when they organize the events, they are primarily to educate the sportsmen, to promote and popularize the sports and also to inform and entertain the viewers. The organization of such events involves huge costs. Whether surplus is left after defraying all the expenses, is ploughed back by them in the organization itself. It will be taking a deliberately distorted view of the right claimed by such organizations to telecast the sporting event to call it an assertion of a commercial right. Yet the MIB has chosen to advance such contention which can only be described as most unfortunate. It is needless to state that we are, in the circumstances, unable to accept the ill-advised argument. It does no credit to the Ministry or to the Government as a whole to denigrate the sporting organizations such as BCCI/CAB by placing them on a par with business

organizations sponsoring sporting events for profit and the access claimed by them to telecasting as assertion of commercial interest.

.....

77. In the first instance, it must be remembered that all the decisions of the US Supreme Court relied upon in support of this contention, are on the right of the private broadcasters to establish their own broadcasting stations by claiming a share in or access to the airwaves or frequencies. In the United States, there is no Central Government-owned or controlled broadcasting centre. There is only a Federal Commission to regulate broadcasting stations which are all owned by private broadcasters. Secondly, the American Constitution does not explicitly state the restrictions on the right of freedom of speech and expression as our Constitution does. Hence, the decisions in question have done no more than impliedly reading such restrictions. The decisions of the U.S. Supreme Court, therefore, in the context of the right claimed by the private broadcasters are irrelevant for our present purpose. In the present case what is claimed is a right to an access to telecasting specific events for a limited duration and during limited hours of the day. There is no demand for owning or controlling a frequency. Secondly, unlike in the cases in the US which came for consideration before the US Supreme Court, the right to share in the frequency is not claimed without

a license. Thirdly, the right to use a frequency for a limited duration is not claimed by a business organization to make profit, and lastly - and this is an important aspect of the present case, to which no reply has been given by the MIB - there is no claim to any frequency owned and controlled by the Government. What is claimed is permission to uplink the signal created by the organizer of the events to a foreign satellite.

78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact, and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and

the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19 (2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be

telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19 (2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the U.S. in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-

censorship unlike the electronic media.

33. Since so much emphasis has been laid on the CBA observations that are to be found in CBA decision how far we need to reflect upon the extent to which it can be applied to the facts of the present case. In other words we need to explore what the principle of stare decisis actually dictates.

34. In *Director of Settlement, A.P. and Others Vs. M.R. Apparao and Another*, (2002) 4 Supreme Court Cases 638, a Three Judge Bench has opined that "Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has

"declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case". The Constitution Bench has also reiterated the view in *Islamic Academy of Education and Another vs. State of Karnataka and Others*, (2003) 6 SCC 697 = 2003(6) Scale 325, that the ratio decidendi of a judgment can be obtained only from a reading of its entirety. This is also the opinion of the Court in *Punjab National Bank Vs. R.L.Vaid*, (2004) 7 SCC 698. In *State of Gujarat Vs. Akhil Gujarat Pravasi*, AIR 2004 SCC 3894, the Hon'ble Supreme Court has observed that "any observation made

during the course of reasoning in a judgment should not be read divorced from the context in which they were used." Most recently, in *Zee Tele Films Vs. Union of India,* AIR SCW 2005 2985, the Court has unequivocally declared that "a decision is not an authority for the proposition which did not fall for its consideration." In *M/s A-One Granites Vs. State of U.P. and others***,** AIR 2001 SC 1203: (2001) 3 SCC 537 it had been contended that the controversy was covered on all fours by a previous decision of the Court. The contention was rejected in these words-

> 11. This question was considered by the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd., (1941) 1 KB 675, and it was laid down that when no consideration was given to the question, the decision cannot be said to be binding and precedents sub silentio and without arguments are of no moment. Following the said decision, this Court in the case of Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101: (AIR 1989 SC 38) observed thus (at p. 43 of AIR):
>
> > "In Gerard v. Worth of Paris Ltd. (K), (1936) 2 All ER 905 (CA), the only point argued was on the question of priority of the claimant's debt, and on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the

> Court of Appeal in Lancester Motor Co. (London) Ltd. v. Bremith Ltd., (1941) 1 KB 675, the Court held itself not bound by its previous decisions. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier Court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed."

In State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, reiterating the same view, this Court laid down that such a decision cannot be deemed to be a law declared to have binding effect as is contemplated by Article 141 of the Constitution of India and observed thus:

> "A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141."

In the case of Arnit Das v. State of Bihar, 2000 (5) SCC 488 : (2000 AIR SCW 2037 : AIR 2000 SC 2264 : 2000 Cri LJ 2971), while examining the binding effect of such a decision, this Court observed thus (Para20):

> "A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be

> deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined."
>
> 12. Thus we have no difficulty in holding that as the question regarding applicability of Rule 72 of the Rules having not been even referred to, much less considered by this Court in the earlier appeals, it cannot be said that the point is concluded by the same and no longer res integra and accordingly this Court is called upon to decide the same.

35. We are also reminded of the frequently quoted opinion of the House of Lords in ***Quinn*** *v. Leathem*, 1901 AC 495 : (1900-3) All ER Rep 1 is that of Lord Halsbury, namely, that "every judgment must be read as applicable to the particular facts proved or assumed to be proved .... The other is that a case is only an authority for what is actually decides". These quotations have been reiterated in *Goodyear India Ltd. -vs- State of Haryana*, (1990) 2 SCC 71 and *State of Orissa -vs- Sudhansu Sekhar Misra*, AIR 1968 SC 647. In the latter case, the Court explicitly opined that "a decision on a question which has not been argued cannot be treated as a precedent". Their Lordships, in turn, referred back to the previous opinion in *Rajput Ruda Meha -vs- State of Gujarat*, 1980 SC 1707 in which it had similarly been stated that

where an issue has neither been raised nor argued any decision by the Court, even after 'pondering over the issue in depth', would not be a binding precedent. Similar observations have been made by the Constitution Bench in *Padma Sundara Rao -vs- State of T.N.*, 2002(3) SCC 533, as is evident from the following extract:

> 9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways Board*, (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

36. We have gone into the parameters of the principle of stare decisis for the reason that some of the observations made by the Supreme Court vis a vis the telecasting/broadcasting of cricket matches and other supporting events may not be contextually apposite today. So far as the CBA or the BCCI is concerned public perception is that today they are primarily concerned

with reaping rich harvest from their broadcasts, and the rights of the citizenry is the least of their concerns. Matches are repeatedly broadcast so often that it has plainly evident that their objective is not to disseminate the sporting prowess, acumen and attributes of the players but more for earning revenue. We cannot also ignore the fact that sports other than cricket receive only nominal coverage, because advertisers are not attracted and because viewership is low. Indeed, the Supreme Court has observed that earning profits per se does not change the character of broadcasted programmes. Their Lordships have also pithily opined that the objective in the mind of the broadcaster has to be determined in order to arrive at an assessment of whether a broadcast should be seen as an activity envisaged by Article 19(1)(a) and accordingly protected to the extent set out in Article 19(2). The number of broadcasters has increased to such a manifold extent that sharing of airwaves, which constitute national wealth, has become an ever expanding problem. This paucity perforce demands profound consideration of the nature of broadcasted programmes, namely, whether they will fall within the genre of freedom of speech and expression or whether they are but another trade or business. It is trite that whereas the extent of

the freedom of speech and expression is almost untrammeled, as it should be, reasonable restrictions can be placed on the right to practice any profession or to carry on any occupation, trade or business. It is, therefore, only to be expected that the Petitioners should prefer that their activities are seen as manifestations of the freedom of speech and expression rather than trade and commerce thereby minimizing State control or interference.

37. There is much substance in the Interim Report dated January 13, 2000 inasmuch as it advocates "separate treatment of transport and content aspects of telecommunication". The segregation and differentiation between "the carriage of information through a variety of technological drivers and the content of that information" is indeed relevant and noteworthy. It appears to us, however that even in case of programmes which may indubitably encompass freedom of speech and expression and accordingly be regulatable only within the confines of Article 19(2), their carriage or transport through telecommunication may adorn the trappings of trade or business. In the latter case the activity would be subject to reasonable restrictions that are in the interests of the general public. We

have queried learned Senior counsel for their opinion as to whether pure entertainment, even raunchy and salacious, could legitimately claim categorization within Article 19(1)(a). Their reply was that generally speaking it would not be proper to place programmes in different categories on the basis of subjective appreciation and that across the spectrum all broadcasters should be eligible to claim the fundamental rights enshrined in Article 19(1)(a). If censorship is called for, it can be resorted to by the appropriate authority. Indeed, none of the learned counsel invited or provoked us to enter upon this conundrum, and so we desist from doing so.

38. The Petitioners reliance on ***SAKAL*** and other decisions is self contradictory. The Supreme Court had opined that "the fixation of a minimum price for the number of pages which a newspaper is entitled to publish is obviously not for ensuring the reasonable price to the buyer of the newspaper but for expressly cutting down volume of circulation to some newspapers making the price so indirectly high or a class of its readers as is likely to deter it from purchasing such newspapers". Assuming that each and every broadcaster is entitled to avail of the freedom of

speech and expression that freedom is not restricted only to the broadcaster but more importantly to the viewer of the programme. Indeed this is so. Only a mentally deranged person would want to exercise his freedom of speech and expression without any audience; is impossible for the State to interfere in any manner whatsoever with personal thoughts. State restrictions or regulations come into play only when a person intends to convey and transmit his thoughts and expressions to the public. Therefore there can be no gainsaying that the individual recipient has the greatest and most significant and meaningful right under Article 19(1)(a). This aspect of free speech is at the fulcrum of every decision of the Hon'ble Supreme Court. In ***SAKAL*** their Lordships were of the view that the existing readership of the newspaper would be adversely affected. We are unable to agree with learned Senior counsel for the Petitioners that if the tariff of pay channels is regulated by the Authority the inexorable and inevitable effect would be that the Petitioners will be run out of business. The Petitioners have not been forthright in presenting even the break-up between advertisement earnings and collection from subscriptions. In this respect they are playing fast and loose by alternating stating in different proceedings that 70 per cent of

their receipts are from subscriptions and 30 per cent from advertisements and vice versa. We would believe that advertisement revenue constitutes 70 per cent of broadcasters earning with the logical consequence that any increase in viewership leads to a corresponding increase in advertising rates. As has already been observed by the Supreme Court, measures of the Governments or Authorities should not result in diminution of readership or viewership, as the case may be, since this will be a classic and obvious infraction of the fundamental freedom guaranteed and preserved by Article 19 (1)(a). The Petitioners have not placed before us their Accounts or Balance-sheets or for that matter any material which would illustrate and disclose that the fixation of a top limit of tariff for a pay channel has resulted in unremunerative earnings and collections by the Petitioners. Learned counsel for the Petitioners were in fact candid enough to state that they did not have sufficient time to collect material and data in this regard. If this is so it only lends credence to the contention of learned counsel for the Respondents that the Petitioners have rushed to this Court in an irresponsible manner without really assessing the actual repercussions of the fixation of impugned tariffs by the Authority. In ***Indian Express Newspapers*** as well as in *A*

Suresh -vs- State of Tamil Nadu, (1997) 1 SCC 319, the Supreme Court has opined that only if the restrictions are onerous and confiscatory would a violation of Article 19(1)(a) of the Constitution occur. We are ever mindful that every person exercising his freedom of speech and expression is entitled to make profits from his efforts. If an author of fiction or literature can earn handsome profits so can a broadcaster. There is no stigma attached to profits. The fundamental question is the extent of profits which can be earned by a person claiming freedom of speech and expression as his fundamental right. In our view, the moment the interests of the viewer or recipient becomes irrelevant or even incidental the activity metamorphoses into a trade or business which is always subject to restrictions that are perceived by the State or any Authority to be in the interest of the general public. In the present petitions beyond a bare ipse dixit that no material has been placed before us by way of substantiation of Petitioners plea that the impugned tariff has illegally impacted their freedom of speech and expression. The position is in fact to the contrary since the lower the subscription rates the larger will be the viewership. We cannot appreciate the argument made on behalf of the Petitioners that free market forces must be

allowed so that ultimately the market can express itself.

39. In conclusion, therefore, the fixation of tariffs by the Authority is within their competence even in regard to broadcasters. The devising of an upper limit of pay channels will have the effect of a wider dissemination and viewership thereby safeguarding the pre-eminent right of the citizenry in the context of freedom of speech and expression. No material has been made available to us to indicate that because of the impugned tariff the Petitioners are unable to make reasonable profits. We are steadfast in this verdict even on the touchstone of Articles 14, 19(1)(a) or 19(1)(g) and/or 301 to 307 of the Constitution.

DOES THE TRAI ACT SUFFER FROM VICE OF EXCESSIVE DELEGATION

40. Section 11(2) of TRAI Act states that notwithstanding anything contained in the Indian Telegraph Act, the Authority may notify the rates at which telecommunication services shall be provided; the Authority may notify different rates for different persons or class of person for reason to be recorded; the Authority shall not act against the sovereign and integrity of India; or the security of the State; or friendly relations with foreign States; or public order, decency or morality. Learned

Senior Counsel for the Petitioners contend that this Section bestows unchannelised, unguided, undefined and untrammeled powers on the delegate namely the Authority, and hence should be struck down. What has to be ascertained in every case where such a submission has been put forward is whether the legislative policy has been delineated before the delegation is made, and also whether a correctional system of superintendence and supervision of the delegate's actions has been put in place. Courts should also consider the degree to which delegation is inevitable or necessary or expedient. The frontiers within which the Delegate/Authority must function is further identifiable from indicia available in the Act itself. The Preamble enjoins that the Authority should endeavour to (a) regulate the telecommunication services, (b) protect the interests of service providers and consumers of the telecom sector, (c) to promote and ensure orderly growth of the telecom sector. Jural experience would vouch that fees or rates prescribed in the statute invariably become unrealistic aeons before they receive corrective attention. Where fees, tariffs and rates are dependent on market forces it is expedient to leave their determination and change to the Executive or the Authority or the Regulators, as the case may be. Where redressal machinery is provided for such

delegation should be impervious to objection. Inasmuch as the TRAI Act provides for the establishment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) with jurisdiction inter alia to hear and dispose of appeals against any direction, decision or order of the Authority, this important safeguard against any possible abuse or arbitrary exercise of power is duly in place. A second Appeal to the Hon'ble Supreme Court of India is also provided for.

41. We also think that if a section or provision of any statute is read in isolation of other parts of that statute, absurd propositions are bound to arise. The Central Government is empowered to make Rules and the Authority to make Regulation by virtue of Section 35. These provisions are immediately followed by Section 37 which mandates that the Rules and the Regulations shall be laid before Parliament.

42. This very question had arisen for consideration in *Quarry Owners' Association -vs- State of Bihar*, (2000) 8 SCC 655. The challenge in that case was also targeted against the fixation of rates of royalty for minor minerals under Section 15 of the Mines

and Minerals (Regulation and Development) Act, 1957 which, no doubt, itemized some of the subjects which could be dealt with by the delegate. The Supreme Court noted that by virtue of Section 28 the State Government was obligated to place such Rules before each House of the State Legislature. It was held that - "requirement of mere placement of the rules or the provisions before the State Legislature is also one of the forms of check on the State Government to exercise its power as a delegatee". A perusal of Section 37 makes it clear that a docile and perfunctory placement of the Rules and Regulations is not what is envisaged in the TRAI Act. The decision is a direct authority in favour of the validity of the TRAI Act making it impregnable to the vice of excessive and unbridled delegation of powers.

43. We are satisfied that the TRAI Act adequately articulates the parameters and ethos within which the Authority must function. The assailed provisions do not suffer from the vice of excessive delegation of powers.

VIRES OF RULES 9 AND 10 OF CABLE TELEVISION NETWORKS (REGULATION) ACT, 1995

44. Section 22 of the Cable Television Networks (Regulation) Act, 1995 [CTN Act] empowers the Central Government, by Notification in the Official Gazette, to make rules to carry out the

provisions of the Act. In exercise of these powers the Central Government has notified the Cable Television Networks Rules, 1994 [CTN Rules] as amended from time to time. Rule 9 thereof has undergone changes via GSR 459(E) dated 6.6.2003. Thereafter, the Rules 9 and 10 were replaced by the existing Rules by virtue of GSR 452(E) dated 31.7.2006. Rule 9(a), which is causing considerable concern to the Petitioners, authorises the Authority to notify standard interconnection agreements to be used for entering into commercial agreements for distribution in the notified areas, all pay or free-to-air channels among (i) broadcasters and multi-system operators; and (ii) multi-system operators and local cable operators. Rule 10 obliges the broadcasters to indicate which of its channels are pay channels or free-to-air channels as also the maximum retail price of each of its pay channels to be charged by the multi-system operators or local cable operators from the subscriber in each of the notified areas. This Notification also introduces into the CTN Rules the definition of broadcasters, multi-system operators (MSO). The Petitioners challenge to the vires of these Rules is that they travel beyond the parameters of CTN Act, 1995, which does not deal with broadcasters and does not even contain a definition of who are broadcasters. Learned Senior

Counsel for the Petitioners have emphasized on the fact that Rule 4A(4) of the Act empowers the Central Government to specify the maximum amount which a cable operator may demand from the subscriber for receiving the programmes transmitted in the basic service tier provided by such cable operator. In response to these arguments learned counsel for the Respondents have contended that the power to prescribe rates and tariffs flows from the TRAI Act and hence it is not essential for the Authority to resort to Rules 9 and 10 of the CTN Act and Rules. It has further been contended that it is not correct that the CTN Act and CTN Rules do not postulate regulation of the activities of the broadcasters.(emphasis added)

45. In this regard we have noted that by Section 2(b) 'cable service' has been defined to mean the transmission by cables of programmes including retransmission by cables of any broadcast television signals; Section 2(g) defines 'programme' as any television broadcast. The CTN Rules repeat these definitions of 'cable services' and 'programme'. It cannot be predicated that broadcasting was never within the contemplation of these provisions. Learned counsel for the Respondents have also submitted that the question of vires of

the CTN Rules vis-a-vis the CTN Act has not been specifically raised in the writ petitions and therefore we should not enter upon this controversy. We have perused the prayers contained in the petitions and find that the Objection has merit. So far as CW 16913-14/2006 filed by Set Discovery Private Limited is concerned prayer (d) reads as follows:

> d) Strike down clauses 3.3 and 9 to 12 of the Telecommunication (Broadcasting and Cable Service) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006) dated 04.09.2006 (No.6-4/2006-B&CS) as amended by the Telecom Regulatory Authority of India; being ultra vires.

The underlined words have been added by hand by the Petitioners in the Petition, making it palpably clear that it was an afterthought. Keeping the nebulosity of the prayer in perspective we are satisfied that the Petitioners ought not to be permitted to mount a challenge to the vires to the Regulations without laying the foundation for it in their pleadings. This is especially so since the challenge to the vires to the Interconnection Regulations with reference to Articles 14 and 19 of the Constitution has been specifically pleaded. On a perfunctory and prima facie level we may reiterate that it is not correct to contend that the CTN Act

does not contemplate broadcasting activity at all. We also draw support from the decision of the Division Bench of the Andhra Pradesh High Court in WP No.12781 of 2006 between Messrs J.K. Communications and The TRAI and others.

46. Furthermore, the TRAI is clearly competent to prescribe the conditions and tariff impugned before us by virtue of the TRAI Act itself. We have already upheld the legality of Section 2 (1) (k), the consequence of which is that broadcasting is undeniably and unassailably covered by that statute. TRAI accordingly is expected to make recommendation inter alia in respect of "measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in services (see Section 11 (1) (a) (iv))". TRAI must regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services (see Section 11 (1) (b) (iv)) and generally to perform such other function including such administrative and financial functions as may be entrusted to it by the Central Government as may be necessary to carry out the provisions of the Act (see Section 11 (1) (d). However, on a perusal of Section 11(2) there is no scope for any controversy concerning the competence of the

TRAI to prescribe the impugned rates at which telecommunication services are to be provided. Therefore, de hors the CTN Act and the CTN Rules TRAI is otherwise competent to fix tariffs, as also to prescribe the Standard Interconnection Agreements.

DISCONNECTION OF TV CHANNEL SIGNALS

47. The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 has been amended by Notification No.6-4/2006-B & CS dated 4-9-2006, in exercise of powers of Section 2 (k) and Section 11 of the TRAI Act. Our attention has been directed towards Regulation 4 thereof which deals with Disconnection of TV Channel Signals and reads as follows-

> 4.1. No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of TV channels without giving three weeks notice to the distributor clearly giving the reasons for the proposed action.
>
> Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has

expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals.

4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3 A broadcaster/multi system operator/distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, which is later.

Explanation

1. In case the notice is published in two newspapers on different dates then the period of three weeks shall start from the latter of the two dates.

2. Broadcaster/multi system operator/distributor of TV channels may also inform the consumers through scrolls

on the concerned channel (s). However, issue of notice in newspapers shall be compulsory.

4.4 The notice in the newspapers must give the reasons in brief for the disconnection.

48. Learned Counsel for the Petitioners have relied on the decision of the Division Bench in ***Mahanagar Telephone Nigam Ltd.*** *-vs- Telecom Regulatory Authority of Delhi*, AIR 2000 Delhi 208 in which it has inter alia been observed that "when the legislature intends to confer on a body the power to vary contracts or existing private rights, it has to do so specifically. In the absence of any provision authorising the authority to vary private rights under existing contracts or licenses, no such power can be presumed or assumed. This is the law laid down reported in Indian *Aluminium Co. -vs- Kerala State Electricity Board*, AIR 1975 SC 1967". In our opinion, however, reliance on these observations would lead to an anachronism. Prior to making these observations our learned Brothers had noted that under Section 11 (1) (b) the Authority merely has a power to recommend terms and conditions of a licence and cannot override the provisions in a contract between the parties. Our learned Brothers had also observed that the Authority has, in purported exercise of powers under Section 11 (1) (d), converted

a recommendatory function into a directory one. It held that it was for the government to decide what are the terms and conditions of a licence to a service provider. What must be borne in mind, however, is that Section 11 has been amended subsequent to the pronouncement of that decision vide the Telecom Regulatory Appellate Authority of India (Amendment) Act, 2000 with effect from 25-3-2000. The amending Act has bifurcated the functions of the Authority. It must now make recommendations under Section 11 (1) (a) and by virtue of Section 11 (1) (b) must discharge several functions, including fixing the terms and conditions of interconnectivity between service providers, maintain interconnect agreements etc., as we have already adumbrated above.

49. Moreover, the Telecommunication (Broadcasting and Cable Services), Interconnection Regulation, 2004 had been issued after ***Mahanagar Telephone Nigam Ltd.***. Regulation 4 has been substituted by the extant provision. In view of these subsequent events it is not open to the Petitioners to contend that the said decision continues to hold the field. A perusal of the Statement of Objects and Reasons of the Telecom Regulatory Authority of India (Amendment) Ordinance, 2000 will disclose

that the President had stated in October, 1999 that the TRAI requires to be strengthened by making suitable amendments to the Act. A Group on Telecom and IT Convergence had been constituted for this purpose, which submitted its Recommendations to the Central Government leading to the promulgation of the Telecom Regulatory Authority of India (Amendment) Ordinance dated 24.1.2000. The salient features of the Amendment were (a) to bring into being a clear distinction between the recommendatory/advisory and the regulatory functions of the Authority as envisaged under sub-section (1) of Section 11 of the Act, (b) empowering the TRAI to fix terms and conditions of interconnectivity between service providers, (c) tariff setting function of TRAI has been brought under the purview of sub-section (3) of Section 11. By means of this very amendment the TDSAT had also been established which by Section 14 has the power to adjudicate any disputes between a licensor and a licencee between two or more service providers or between a service provider and a group of consumers and to hear and dispose of appeals against any direction, decision or order of the Authority under the Act. We cannot accept the argument that the law does not empower TRAI to fix terms of interconnection.

RESTRICTIONS ON DISCONNECTION

50. The contention on behalf of the Petitioners is that the extant Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 deserve to be struck down since it stipulates that no broadcaster shall disconnect TV signals to distributor without giving three weeks notice even though the distributor may be in default. Reliance has been placed by them on the first proviso of Regulation 3.2 which states that in the event that a distributor of TV channels has defaulted in payment to the broadcaster, the latter shall not be obliged to provide signals on non-discriminatory terms. However, the legal maxim that a person cannot be a judge in his own cause persuades us to prefer the view that the broadcaster should not be permitted to arrogate to himself the unilateral power of determining whether one of his distributors has defaulted in payment. The requirement for issuance of a three weeks notice in which the reasons for proposed disconnection are spelt out, is not unreasonable. It enables the raising of a dispute by the parties before an independent forum. What must not be overlooked is that the subscriber has a fundamental right of viewership which has preeminence over that of the broadcasters' fundamental rights. The impugned Regulations are calculated to protect the

viewers' interest. The second proviso to Regulation 4.1 clarifies that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals. There is no incongruity between these Regulations once it is understood that the second proviso to Regulation 3.2 would come into play only when the dispute has been adjudicated upon by the appropriate forum. This proviso has the effect of not only imparting reasonableness to the impugned Regulation but it also protects the copyright of the broadcaster. It is for these reasons that we reject the contention put forward on behalf of the Petitioners that Regulation 4, introduced by means of the amendment dated 4.9.2006, suffers from any legal vice.

51. We do not find any merit in the writ petitions which we hereby dismiss. The parties shall, however, bear their respective costs. A copy of this Judgment be placed by the Registry in all the connected matters.

(VIKRAMAJIT SEN)
JUDGE

July 09, 2007
n/tp/nvn

(J.P. SINGH)
JUDGE